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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SARAH T. MARCUS,

Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Defendant and Respondent.

D042713

(Super. Ct. No. GIC802054)

APPEAL from a judgment of the Superior Court of San Diego County, Kevin A. Enright, Judge. Affirmed.

Plaintiff Sarah T. Marcus was dismissed as a student from the medical school at the University of California at San Diego (UCSD). She sued defendant Regents of the University of California (the Regents), alleging six causes of action, including claims of discrimination, violation of the Americans with Disabilities Act (ADA) and breach of contract. The trial court granted the Regents's general demurrer without leave to amend

on a variety of theories, some applicable to the complaint in general and some to the individual causes of action. Marcus appeals.

BACKGROUND

A. Complaint

In December 2002 Sarah Marcus sued the Regents. A first amended complaint alleged that in the fall of 1999 Marcus enrolled at the medical school at UCSD. Because of traumatic incidents in her past and because she had never been away from home, Marcus became depressed immediately after arriving at the school. As a result she did poorly in her studies. Referred to a psychiatrist, Marcus was diagnosed as suffering from clinical depression. Treated for the condition, her grades improved. However, because her course work in her first and second quarters was unsatisfactory, a dismissal proceeding was conducted before the Standing and Promotions Committee (the committee) in June 2000.

The complaint alleged Marcus openly complained that other medical students were cheating and because she made these allegations, Dr. Maria Savoia¹ sought to destroy Marcus's medical career. The complaint suggested Savoia sought to do so because "UCSD gained an unfair advantage over other colleges by not enforcing its rules regarding cheating."

The complaint states that during the course of the June 2000 dismissal hearing, the committee failed to recognize Marcus was suffering from clinical depression. The

¹ The complaint does not indicate Savoia's connection to the Regents.

committee stated she " 'was not quite grown up' and that her choices were 'very immature.' " At no time during the hearing did the committee treat appellant as having a disability. The complaint states such attitude was not only discriminatory but exacerbated Marcus's depression.

The committee placed Marcus on academic probation and ordered her to repeat the first year of medical school. The committee "placed [her] back into the very same system without any additional support or guidance, again ignoring her disability."

Marcus was not given tutoring beyond that provided other students. Her professors refused to assist her, replying to her questions with such remarks as " 'look it up in a book.' " One professor referred to Marcus in front of other students as " 'the repeat.' "

The complaint alleged Marcus did well in the first quarter of 2000. However, as the quarter progressed, her bouts of depression increased in severity. Marcus asked if as an accommodation she could have additional time to take her examinations. The request was denied. She passed her examination in social and behavioral sciences. She passed the first nine segments of her class in cell biology and biochemistry but not the tenth. As a result Marcus was dismissed from the medical school. She alleges that had she been referred to the Office of Students with Disabilities as UCSD policy required she would not have failed.

Marcus appealed her dismissal. In August 2001 she was told that if she was disabled she would be readmitted to the medical school. In October 2001 after being readmitted Marcus was informed she would be placed back on academic probation. She

was told she would be granted no accommodations for her depression unless she provided advance notice of the onset of an episode of depression. Professors refused to provide her assistance in her studies, stating Marcus had already seen the course material twice.

In March 2002 Marcus sought a leave of absence from the medical school to deal with the side effects of a new medication. The request was denied on the basis that she was required to take an examination make-up in organ physiology. Another professor stated that if she requested a leave of absence, she would not be allowed to return. The Regents continued to deny Marcus reasonable accommodations for her condition.

During her final quarter in 2002, Marcus passed all of her examinations but received a "Y" in endocrinology. While it is not stated in the complaint, this is apparently a designation for a course not completed. Marcus was first notified she could make up the final examination. However, the accommodation was later rescinded and a grade of "F" was entered on her record for the course. This grade resulted in Marcus being dismissed from the medical school.

A hearing was held before the committee in July 2002. Marcus was not allowed to have either her treating physician or her attorney present at the hearing. She was allowed to appear with her faculty advisor. Before the hearing Marcus mentioned to her faculty advisor the ADA and the issue of reasonable accommodations. The advisor stated the medical school was not concerned with the ADA or making accommodations. The advisor screamed at Marcus that he would "kick her out of his office" if she planned to raise those issues. Consequently, she did not raise those matters before the committee.

Based on these facts Marcus asserted the following causes of action: (1) discrimination based on a mental disability (Civ. Code, § 51.5); (2) discrimination based on a mental disability (ADA, tit. II, 42 U.S.C. § 12131 et seq.); (3) failure to reasonably accommodate a mental disability; (4) breach of contract; (5) breach of the implied covenant of good faith and fair dealing; (6) promissory estoppel based upon detrimental reliance.

B. Demurrer

The Regents demurred to the complaint. It argued that all causes of action were barred because Marcus failed to seek a writ of mandate to redress her grievances before bringing an action for civil damages. As to the discrimination cause of action, based on state law the Regents argued it was a "public entity" not a "business establishment" and was, therefore, not subject to suit under the Unruh Civil Rights Act (Civ. Code, § 51).

As to the causes of action based on the ADA, the Regents argued it was a state agency and pursuant to the Eleventh Amendment of the United States Constitution, immune from suit.

As to the contractual claims, the Regents argued it had no contract of any type with Marcus. The Regents argued Marcus's contractual actions were based on misrepresentations of its accommodations policy. The Regents contended that under the Tort Claim Act it was immune from such causes of action. As to Marcus's cause of action based on breach of the implied covenant of good faith and fair dealing, the Regents argued the cause of action was non-statutory and, thus, barred by the Tort Claims Act.

C. Ruling

The trial court sustained the Regents's demurrer without leave to amend. The court held Marcus's action was barred since she was required to and had failed to seek a writ of mandate before bringing her action for damages. The court sustained the demurrer to the state discrimination claim, finding the section on which Marcus based her action did not apply to the Regents. It sustained the federal based discrimination causes of action based on the state's immunity to suit under the Eleventh Amendment. The court sustained the Regents's demurrer to the causes of action based on a violation of the implied covenant of good faith and fair dealing and promissory estoppel on the basis that such claim are inapplicable to government entities.

DISCUSSION

Different counsel has represented Marcus at various stages of this proceeding. One lawyer represented her in the trial court, another prepared her opening brief and a third wrote her reply brief. As a result of these changes in counsel, we have some difficulty in determining exactly what her position is with regard to the issues raised. We outline our understanding of Marcus's position on appeal.

The Regents argued below that its demurrer should be sustained as to all of Marcus's causes of action because she failed to exhaust her judicial remedies by not seeking a writ of administrative mandamus before filing the present action for damages. Marcus's only response in the trial court was that seeking mandamus would have been futile since the Regents was limited to readmitting her to its medical school and could not award her the damages and attorney fees she sought.

Citing *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, the trial court sustained the Regent's demurrer to all causes of action on the basis of Marcus's failure to exhaust judicial remedies with regard to her dismissal from the medical school.

In her opening brief Marcus argued the judicial exhaustion requirement was inapplicable to her second and third causes of action, generally contending that those federal ADA claims were not subject to the exhaustion requirement. Marcus also argued the Regents had no sovereign immunity under the Eleventh Amendment to the United States Constitution. With regard to the remaining state law-based causes of action, Marcus argued that if they were barred by her failure to exhaust judicial remedies, the trial court was obliged to treat her complaint seeking damages as a petition for writ of mandate or at least allow her to amend her complaint to style it a petition for writ of mandate. In her reply brief, prepared by different counsel, Marcus makes a more focused and complete argument, contending that her two causes of action based on federal law were not subject to the requirement of judicial exhaustion.

From this we understand the following: Marcus generally concedes her state law causes of action were barred by her failure to exhaust her judicial remedies applicable to her dismissal. She argues, however, the trial court should have treated her complaint as a petition for a writ of administrative mandamus and should have treated her state and federal causes of action as joined with that petition.

Marcus argues the judicial exhaustion requirement does not apply to causes of action based on the ADA. She also contends these causes of action are not abrogated by

the Eleventh Amendment of the federal Constitution. With this understanding of Marcus's position, we address her appeal.

A. Law of Demurrers

"A demurrer admits all material facts properly pleaded, and because review of a ruling on a demurrer is a pure legal question, the trial court's determination is entitled to no deference from us. We must afford a reasonable interpretation of the complaint read as a whole with its parts in context. [Citation.] If the factual allegations of the complaint are adequate to state a cause of action under any legal theory, the demurrer must be overruled. [Citation .] We can only uphold a general demurrer sustained without leave to amend if it appears there is no cause of action stated under applicable substantive law. [Citation.]" (*Charpentier v. Los Angeles Rams Football Co.* (1999) 75 Cal.App.4th 301, 306-307, fns. omitted.)

When a complaint is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment. If it can, the trial court has abused its discretion and we reverse. If not, there has been no abuse of discretion and we affirm. The burden of proving such reasonable possibility is on the plaintiff. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. Exhaustion of Judicial Remedies

In *Westlake Community Hosp. v. Superior Court*, *supra*, 17 Cal.3d at pages 482-485, the court held that unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions. (*Johnson v. City of Loma*

Linda (2000) 24 Cal.4th 61, 69-70.) Marcus acknowledges this rule as applicable to her state claims but argues it has no application to her causes of action based on title II of the ADA. We disagree.

While an action brought under title I of the ADA, dealing with discrimination in employment, requires an exhaustion of state and federal *administrative remedies*, an action under title II of the ADA, dealing with discrimination by a public entity, arguably does not. (29 U.S.C. § 794a; 42 U.S.C. § 12132; 42 U.S.C. § 2000e-5(a); 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 2000e-5(e)(1); Sufian and Passamano, *Representing a ADA Plaintiffs*, §§ 9:02, 14:32-14:38; see *King ex rel. Jacob v. Secretary* (2002) 774 N.E.2d 1008, 1010-1012.)

The difficulty for Marcus is that *Westlake* deals not with the exhaustion of *administrative remedies* but the exhaustion of *judicial remedies*. The *Westlake* rule is based not on policies promoting administrative resolution of disputes but rather on concepts of res judicata. (*Johnson v. City of Loma Linda, supra*, 24 Cal.4th at pp. 69-70; *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 645-646.) Marcus bases her argument that *Westlake* does not require she bring a mandamus action before bringing a action under title II of the ADA on cases holding that an exhaustion of *administrative remedies* is not a necessary prerequisite to the bringing of a civil rights action under 42 U.S.C. section 1983. (See e.g., *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 335-341.) While an exhaustion of *administrative remedies* is not a prerequisite to bringing such an action, an exhaustion of *judicial remedies* is. (*Briggs v. City of Rolling Hills Estates, supra*, 40 Cal.App.4th at pp. 646-648.)

There is no basis for concluding a different rule should apply to the exhaustion of state judicial remedies before bringing an action under title II of the ADA. The trial court properly sustained the Regents's demurrer to both Marcus's ADA and state law causes of action on the basis she had failed to first exhaust her judicial remedies arising from the Regents's actions.

B. Treating Complaint as Petition for Writ of Administrative Mandamus

Marcus argues that in order to save her case from dismissal based on her failure to exhaust administrative/judicial remedies, the trial court should have treated her complaint seeking damages as a petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) and, as we understand her various pleadings, treat that petition as joined with her causes of action seeking damages.

Marcus notes the general rule that if a complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. A court is not confined to the plaintiff's theory of recovery in testing the sufficiency of its complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 37.)

Marcus then cites cases holding that while a suit for declaratory or injunctive relief is not a proper vehicle for challenging administrative decisions, it should be treated as a petition for writ of administrative mandamus for the purposes of ruling on a general

demurrer. (*Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 287; *Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1479-1480.)

Marcus argues her complaint, while seeking damages, sufficiently alleged facts suggesting the Regents's quasi-judicial determination resulting in her dismissal from medical school was defective and her complaint should have been treated a petition for writ of administrative mandamus. So treated, Marcus's additional causes of action could be joined to the petition. (Code Civ. Proc., § 427.10, subd. (a); see e.g., *State of California v. Superior Court* (1974) 12 Cal.3d 237, 244; *Adler v. Los Angeles Unified School Dist.* (1979) 98 Cal.App.3d 280, 284-285; 1 Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed.) § 10.59, p. 388.)

Marcus's complaint did not seek a declaration that the Regents failed to provide her proper administrative procedure or wrongly decided her case. The complaint did not seek a new dismissal hearing or her reinstatement as a medical student. When the issue of her failure to exhaust judicial remedies was raised below, Marcus did not seek leave to amend her complaint to include a petition for administrative mandamus; instead, she argued petitioning was futile since a writ would not provide the remedy she sought in her complaint.

The logic of treating a complaint for declaratory relief as a petition for writ of administrative mandamus is that a petition for a writ of administrative mandamus is in effect a request for declaratory relief. (See *Mir v. Charter Suburban Hospital*, *supra*, 27 Cal.App.4th at pp. 1479-1480.) The metamorphosis of a complaint for damages into a petition for a writ of administrative mandamus has no such compelling logic or claim to

simple fairness. Marcus does not seek to merely change the title of her action to allow pursuit of an administrative resolution of her claimed grievances; rather, she seeks a means of avoiding her failure to promptly petition to for a writ in order to continue with her statutory and contractual claims for damages. We know of no authority allowing her to do so.

The judgment is affirmed.

BENKE, P. J.

WE CONCUR:

NARES, J.

AARON, J.